EXHIBIT 13

Court of Appeal

*Three Rivers District Council and others *v* Governor and Company of the Bank of England (No 4)

[2002] EWCA Civ 1182

2002 July 15, 16; Aug 7

Lord Phillips of Worth Matravers MR, Chadwick and Keene LJJ

Practice — Discovery — Third party — Classes of documents — Action alleging misfeasance in public office in respect of defendant's supervision of bank — Application for disclosure against non-party of documents produced for inquiry — Whether documents "likely" to support applicants' case — Whether documents in control of non-party — CPR rr 31.8, 31.17

Prior to its collapse in 1991, BCCI carried on business in the United Kingdom as a deposit taker under a licence from the Bank of England. Following its collapse, an inquiry into the supervision of BCCI under the Banking Acts was conducted by Bingham LJ, who submitted his report to the Chancellor of the Exchequer and the Bank in July 1992. The documents provided to or generated by the inquiry were stored in an archive. In 1992 the claimants, who were former depositors in BCCI, commenced proceedings alleging misfeasance in public office by officials of the Bank. Much of the claimants' pleaded case was based on material from the Bingham report. After the House of Lords in interlocutory proceedings had established the test to be applied in determining whether there had been misfeasance in public office and had ordered that the claim should be allowed to proceed to trial, the claimants applied for discovery of documents contained in the Bingham archive, under CPR r 31.17[1], against HM Treasury and other non-parties to the action. Disclosure was sought of documents or classes of documents listed in a schedule. A second application was made against the Bank of England under rule 31.12 for specific disclosure of material in the archive on the basis that the archive was in the control of the Bank within rule 31.8. The Treasury accepted for the purposes of the first application that the documents sought were in its control for the purposes of rule 31.8 but contended, inter alia, that the threshold conditions imposed by rule 31.17(3)(a) were not met. On hearing both applications, the judge declared that the requirements of rule 31.17(3)(a) were satisfied in respect of the scheduled material, but that the Bank did not have control of the archive within rule 31.8 and was under no obligation to disclose its contents to the claimants under rules 31.6 or 31.12.

On appeals by the Treasury against the declaration that the requirements of rule 31.17(3)(a) were satisfied, and by the claimants against the declarations in relation to the Bank—

Held, dismissing both appeals, (1) that, in determining under CPR r 31.17(3)(a) whether the documents to be disclosed by a non-party were "likely" to support the applicant's case or adversely affect that of another party, the test to be applied by the court would be satisfied where the documents "might well" support or adversely affect a party's case; that the word "likely" took its meaning from its context and, where the context was a jurisdictional threshold to the exercise of a discretionary power, a modest threshold of probability was sufficient and it was not necessary to show that the disclosure was more probable than not to support or adversely affect a party's case; that where the disclosure sought was of a class of documents the threshold test had to be applied to each document in the class; that the test would not be satisfied if there were documents within the class which were not relevant to any issue within the proceedings, but could be satisfied by critical examination of each

[1] CPR rr 31.8 and 31.17: see post, para 4.

A sub-class without requiring individual scrutiny of each document; that in the very unusual circumstances of the case the claimants were not required to demonstrate precisely how each and every document or class of documents of which they sought disclosure would support their case or damage that of the Bank; and that the judge had directed himself correctly as to the threshold condition required by rule 31.17(3)(a) and had been entitled on the evidence to conclude that the condition was satisfied (post, paras 17–18, 22, 32–33, 36, 38–40, 43–45, 52).

B *Black v Sumitomo Corpn* [2002] 1 WLR 1562, CA applied.

(2) That, although it was difficult to determine where ownership of the archive lay, the question to be determined under CPR r 31.8 was whether the Bank, which had never had physical possession of the archive, had a present right to possession or to inspect and take copies; and that since the Bank plainly had neither of those rights it was not in control of the archive and therefore could not be required to disclose the archive to the claimants (post, paras 47, 50–52).

C Decision of Tomlinson J [2002] EWHC 1118 (Comm) affirmed.

The following cases are referred to in the judgment of the court:

American Home Products Corpn v Novartis Pharmaceuticals UK Ltd (unreported) 18 December 2000, Laddie J; [2001] EWCA Civ 165; [2001] FSR 784, CA

Black v Sumitomo Corpn [2001] EWCA Civ 1819; [2002] 1 WLR 1562, CA

Cie Financière et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD

D 55, CA

Consumer and Industrial Press Ltd, In re [1988] BCLC 177

Harris Simons Construction Ltd, In re [1989] 1 WLR 368

Howglen Ltd, In re [2001] 1 All ER 376

Panayiotou v Sony Music Entertainment (UK) Ltd [1994] Ch 142; [1994] 2 WLR 241; [1994] 1 All ER 755

Primlaks (UK) Ltd, In re (1989) 5 BCC 710

E *SCL Building Services Ltd, In re* (1989) 5 BCC 746

Swain v Hillman [2001] 1 All ER 91, CA

Tanfern Ltd v Cameron-MacDonald (Practice Note) [2000] 1 WLR 1311; [2000] 2 All ER 801, CA

Three Rivers District Council v Bank of England (No 3) [2001] UKHL 16; [2001] 2 All ER 513, HL(E)

Three Rivers District Council v Governor and Company of the Bank of England

F *(No 3)* [2000] 2 WLR 1220; [2000] 3 All ER 1, HL(E)

Wakefield v Outhwaite [1990] 2 Lloyd's Rep 157

The following additional cases were cited in argument:

Anselm v Anselm (unreported) 15 December 1999, Neuberger J

Clark v Ardington Electrical Services [2001] EWCA Civ 585, CA

Continental Reinsurance Corpn (UK) Ltd v Pine Top Insurance Ltd [1986] 1 Lloyd's

G Rep 8, Staughton J and CA

Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627, HL(E)

Lyle v Chipchase (unreported) 26 February 1998; Court of Appeal (Civil Division) Transcript No 348 of 1998, CA

Macmillan Inc v Bishopsgate Investment Trust plc [1993] 1 WLR 1372; [1993] 4 All ER 998, CA

Pride Valley Foods Ltd v Hall & Partners (Contract Management) Ltd (unreported)

H 8 May 2002, Judge Toulmin QC

R v Chief Constable of West Midlands Police, Ex p Wiley [1995] 1 AC 274; [1994] 3 WLR 433; [1994] 3 All ER 420, HL(E)

Rowbotham Baxter Ltd, In re [1990] BCC 113

Science Research Council v Nassé [1980] AC 1028; [1979] 3 WLR 762; [1979] 3 All ER 673, HL(E)

Wallace Smith Trust Co Ltd v Deloitte Haskins & Sells [1997] 1 WLR 257; [1996] 4 All ER 403, CA

The following additional cases, although not cited in argument, were referred to in the skeleton arguments:

Davies (Joy Rosalie) v Eli Lilly & Co [1987] 1 WLR 428; [1987] 1 All ER 801, CA
Harrison v Bloom Camillin The Independant, 28 June 1999
Soden v Burns [1996] 1 WLR 1512; [1996] 3 All ER 967
Sunderland Steamship P and I Association v Gatoil International Inc [1988] 1 Lloyd's Rep 180
Woolgar v Chief Constable of Sussex Police [2000] 1 WLR 25; [1999] 3 All ER 604, CA

APPEALS from Tomlinson J

By an application notice dated 12 March 2002 the claimants, Three Rivers District Council and some 6,000 other creditors of the Bank of Credit and Commerce International SA ("BCCI") and the Bank of Credit and Commerce International SA (in liquidation), applied under CPR r 31.17 against HM Treasury and other non-parties to the claimants' action against the Bank of England ("the Bank"), and by application notice dated 21 March 2002 under rule 31.12 against the Bank itself, for disclosure of "the Bingham archive", the body of material assembled by Bingham LJ during the course of the inquiry, held at the Public Record Office, into the Bank's supervision of BCCI. At the hearing before Tomlinson J the claimants pursued a more limited request for disclosure from the archive, namely of certain documents and classes of documents set out in a schedule. By order of 31 May 2002 [2002] EWHC 1118 (Comm) Tomlinson J declared (1) that the archive was not in the control of the Bank within the meaning of rule 31.8; (2) that the Bank was under no obligation to disclose the archive to the claimants pursuant to rules 31.6 or 31.12; and (3) that the requirements of rule 31.17(3)(a) were satisfied in respect of the scheduled material.

By an appellant's notice dated 14 June 2002 the claimants appealed against the judge's first two declarations on the grounds, inter alia, that the Bingham archive was within the control of the Bank within the meaning of rule 31.8 and the Bank was under an obligation to disclose the Bingham archive to the claimants or, in the alternative, that the decision of Tomlinson J was unjust because of a serious procedural or other irregularity in the proceedings, in that the judge did not decide who had control of the Bingham archive.

By an appellant's notice dated 14 June 2002 the Treasury appealed against the judge's third declaration on, inter alia, the following grounds. (1) On a proper construction of rule 31.17 the claimants were required to satisfy the court on evidence in respect of each document or class of documents that that document or class of documents was likely to support the case of the claimant or adversely affect the case of the defendant. (2) The judge was wrong to hold that the claimants had satisfied the jurisdictional requirements of rule 31.17(3)(a) simply by identifying a class of documents sufficiently connected with the subject matter of the dispute capable of advancing their argument or damaging the counter-argument, characterising the Bingham archive as a whole. (3) The judge was wrong so to hold because it would be contrary to the purpose and proper construction of rule 31.17 for its jurisdictional requirements to be capable of being

A satisfied by characterising an extensive and varied body of materials, the Bingham archive, which constituted 708 files, as a "class" of documents. (4) There was no evidence before the court to show that such a class of documents was likely to support the case of the claimants or adversely affect the case of the Bank, and accordingly the judge should not have been satisfied in that regard. (5) The judge should have held that the word "likely" bore its usual English meaning, or bore the meaning "more probable B than not". He was wrong to hold that for the purposes of rule 31.17(3)(a) it meant only "may well". In any event he should not have been satisfied that the claimants had fulfilled even the lower "may well" test in respect of any particular document or class of documents. (6) The judge was wrong to treat the present case as exceptional, since such questions were relevant to discretion rather than jurisdiction. (7) The effect of the judge's decision on C jurisdiction was to place a greater burden on a non-party to give disclosure under rule 31.17 than could be placed on a party to litigation. (8) The judge failed to apply the Court of Appeal's decision in *American Home Products Corpn v Novartis Pharmaceuticals UK Ltd* [2001] FSR 784 and Pumfrey J's decision in *In re Howglen Ltd* [2001] 1 All ER 376.

By a respondent's notice filed on 28 June 2002 the Bank appealed against the judge's declaration that the requirements of rule 31.17(3)(a) were D satisfied in respect of the scheduled material and his failure to dismiss the claimants' application under rule 31.17, on the grounds that (1) the judge was wrong to hold that the claimants had satisfied the jurisdictional requirement for non-party disclosure in rule 31.17(3)(a); (2) the judge ought to have dismissed the claimants' application under rule 31.17 on the grounds that the jurisdictional requirements for non-party disclosure in E rule 31.17(3)(b) were not satisfied, and/or that, in the exercise of his discretion, the application did not satisfy the overriding objective in rule 1.1(1) of doing justice between the parties and because of the likely effect on the trial timetable of making such an order.

The facts are stated in the judgment of the court.

Charles Hollander QC and *Sarah Lee* for the Treasury.

F *Nicholas Stadlen QC*, *Bankim Thanki* and *Ben Valentin* for the Bank.

Gordon Pollock QC, *David Mildon QC* and *Barry Isaacs* for the claimants.

Cur adv vult

7 August. **CHADWICK LJ** handed down the following judgment of the G court.

1 For some 19 years prior to its collapse in July 1991, Bank of Credit and Commerce International SA ("BCCI") carried on business in the United Kingdom as a deposit taker. From June 1980 it did so under a licence granted by the Bank of England ("the Bank") pursuant to section 3(2) of the Banking Act 1979. The widespread concern in the financial community— H and, more generally, amongst those members of the public who were depositors—as to the circumstances in which senior employees of BCCI had been able to perpetrate what was perceived as fraud on a vast scale led, within a very short time of its collapse, to the setting up of an inquiry into the supervision of BCCI under the Banking Acts. Bingham LJ was appointed to

conduct that inquiry. He submitted his report Inquiry into the Supervision of the Bank of Credit and Commerce International ("the Bingham report") to the Chancellor of the Exchequer and the Governor of the Bank in July 1992. The report—but not the eight appendices to the report—were published in October 1992 as HC Paper (1992–93) No 198.

2 These proceedings were commenced in May 1993. The claimants are former depositors in BCCI. The claim includes allegations of misfeasance in public office by officials of the Bank. Much of the claimants' pleaded case is, necessarily, based upon material taken from the Bingham report. As Lord Hope of Craighead observed, on the second of the two occasions on which interlocutory appeals have been before the House of Lords, in *Three Rivers District Council v Bank of England (No 3)* [2001] 2 All ER 513, 544, para 98:

> "The present case is, as everyone concerned with it has recognised, one of a quite exceptional character. The issues of fact which the claimants seek to raise are highly complex. They relate to matters in which they were not directly involved, as they were third parties to the system of regulation which was set up to protect them. They involve meetings and discussions between many parties at which they were not represented and they extend, through no fault of theirs, over a very long period."

The procedural history of the action so far is fully set out in the speech of Lord Hope to which we have just referred. It is unnecessary to rehearse that history in this judgment. It is sufficient to note that, in the first interlocutory appeal, *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 1220, the House of Lords established the test to be applied in determining whether there has been misfeasance in public office; and, in the second appeal [2001] 2 All ER 513, held (Lord Hobhouse of Woodborough and Lord Millett dissenting) that the claim in respect of misfeasance in public office should proceed to trial.

3 In the course of his speech in the second appeal, after pointing out that the claimants had not had the benefit of discovery of documents or the obtaining of answers to interrogatories, Lord Hope observed [2001] 2 All ER 513, 523, para 30:

> "The assumption can properly be made at this stage that the narrative which the [Bingham] report contains will in due course be capable of being established by evidence once the claimants have obtained access to the relevant documents."

And, at p 524, para 32:

> "It can, as I have said, be assumed that if the claim is not struck out the claimants will in due course have access to the evidence which provides the source material for that narrative, and that that evidence will be capable of being led by them at the trial."

Lord Steyn, at p 517, para 6, said that he did not share the confidence of the judge and the Court of Appeal that discovery and cross-examination would not produce significant materials assisting the claimants. This, he thought, was a case which should be examined and tested with the procedural advantages of a fair and public trial; and was a case in which the judge "will wish to proceed to trial with due despatch and a minimum of technical

A interlocutory hearings": see p 517, para 8. Lord Hutton expressed similar views, at pp 563 and 564, paras 147 and 151.

The applications for disclosure

4 It is against that background that the claimants made the applications for disclosure of documents with which we are now concerned. They are B made, respectively, under CPR rr 31.12 and 31.17. It is convenient to set out the relevant provisions in those rules:

> "31.12(1) The court may make an order for specific disclosure or specific inspection.
>
> "(2) An order for specific disclosure is an order that a party must do one or more of the following things—(a) disclose documents or classes of C documents specified in the order . . ."
>
> "31.17(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.
>
> "(2) The application must be supported by evidence.
>
> "(3) The court may make an order under this rule only where—(a) the D documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.
>
> "(4) An order under this rule must—(a) specify the documents or the classes of documents which the respondent must disclose . . ."

E Each of those rules must be read in conjunction with rule 31.8, which provides:

> "(1) A party's duty to disclose documents is limited to documents which are or have been in his control.
>
> "(2) For this purpose a party has or has had a document in his control if—(a) it is or was in his physical possession; (b) he has or has had a right F to possession of it; or (c) he has or has had a right to inspect or take copies of it."

And it must be kept in mind that disclosure is not sought as an end in itself. The object of disclosure (at least in this case) is to enable the claimants to inspect the documents disclosed. In that context, the provisions of rule 31.3(1) are relevant: G

> "A party to whom a document has been disclosed has a right to inspect that document except where—(a) the document is no longer in the control of the party who disclosed it; (b) the party disclosing the document has a right or a duty to withhold inspection of it . . ."

5 The first (in time) of the applications with which we are now H concerned was issued on 12 March 2002. Those named as respondents included HM Treasury. The claimants sought an order against the Treasury, pursuant to rule 31.17, for disclosure of the documents or classes of documents listed in a schedule to the application. Put shortly, those are documents provided to, or generated by, Bingham LJ in the course of his

inquiry. The second application was issued on 21 March 2002. It sought an order against the Bank, pursuant to rule 31.12, for specific disclosure of

> "the evidence and other material obtained and produced by and on behalf of Bingham LJ and the inquiry team (including the secretariat) during the course of the Bingham Inquiry into the supervision of BCCI from 1991 to 1992 ('the archive')."

6 It is obvious—and not in dispute—that the documents sought from the Bank must include the documents sought from the Treasury. In those circumstances it is obvious, also, that if and in so far as the documents sought are now in the control of the Bank—so that success on the second application leads to inspection of those documents by the claimants—the first application is misconceived—because disclosure of those documents by the Treasury could not be necessary to dispose fairly of the claim or to save costs: see paragraph (b) of rule 31.17(3).

7 The applications were heard by Tomlinson J over three days in May 2002. He handed down his written judgment on 31 May 2002. He directed himself—correctly, in our view—that the first question which he had to decide was whether the Bank had a right to possession, or a right to inspect and take copies, of the material described in the second application as the archive. He held that the Bank did not have that right. The order which he made on 31 May 2002 contains declarations which reflect that decision. He declared (1) that the archive is not in the control of the Bank within the meaning of rule 31.8 and (2) that the Bank is under no obligation to disclose the archive to the claimants pursuant to rule 31.6 or 31.12. The claimants appeal to this court against those declarations.

8 The judge's conclusion on that question made it necessary for him to address the application of 12 March 2002—that is, the application for an order under rule 31.17 against the Treasury. He recorded that it was common ground that—if he were satisfied that the threshold conditions in paragraph (3) were met—he could not make an order for disclosure because questions of confidentiality and public interest immunity would remain to be investigated. Plainly, those are questions which are likely to arise under rule 31.3(1)(b) on any request to inspect the material of which disclosure is sought in this case; and there would be little or no purpose in an order for disclosure under rule 31.17 if the documents disclosed could not be inspected.

9 For that reason—if for no other—it seemed to us that the judge was correct, also, to take the view that he could not reach a conclusion in relation to threshold condition (b) of rule 31.17(3). As he put it at paragraph 82 of his written judgment:

> "Obviously I could not at this stage consider and I am not asked to consider the requirement under rule 31.17(3)(b) that disclosure be necessary in order to dispose fairly of the claim. That will involve amongst other things consideration of confidentiality and [public interest immunity]. There also remains for consideration the question whether the court's discretion should be exercised in the applicant's favour."

The Bank sought to challenge the judge's refusal to dismiss the application of 12 March 2002 on the ground that threshold condition (b) was not met—

A alternatively as a matter of discretion—but we declined to entertain an appeal on those grounds.

10 The judge confined his consideration of the application of 12 March 2002 to the question whether threshold condition (a) of rule 31.17 was met. He held that it was. In expressing his conclusion, the judge said, at the first of two paragraphs numbered 81 in his judgment:

B "My conclusion is that in the very unusual circumstances of this case the claimants are not required, in order to satisfy CPR r 31.17(3)(a), to make a detailed application identifying each and every document or class of documents of which they seek disclosure from the archive demonstrating in relation to each such document or class of documents how precisely it will support their case or damage that of the Bank. By the same token the claimants are not required to eliminate the possibility that C the documents of which they seek disclosure might include some which on inspection have no probative value in the case. Given the nature of the archive that would be an entirely pointless, time-consuming and expensive exercise, and in my judgment the authorities to which I have referred show that I am not required to interpret rule 31.17 in a manner which brings about what would be, in the special circumstances of this D case, an absurd and very undesirable situation."

The Treasury appeals against the declaration, made in paragraph (3) of the order of 31 May 2002, that the requirements of rule 31.17(3)(a) are satisfied in respect of the material identified in the schedules to that order ("the scheduled material").

E *The appeals to this court*

11 There are, therefore, two appeals before this court: (i) the Treasury's appeal (2002/1276) from the declaration that the requirements of rule 31.17(3)(a) are satisfied in respect of the scheduled material; and (ii) the claimants' appeal (2002/1280) from the declaration that the archive is not in the control of the Bank and the consequential declaration that the Bank is F under no obligation to disclose the archive to the claimants. It is convenient to consider the appeals in that order; although this inverts the logical sequence adopted by the judge. The reason is that it was made clear to us by Mr Pollock, on behalf of the claimants, that—if the Treasury's appeal were dismissed—his clients would be content to pursue their objectives of disclosure and inspection under the application of 12 March 2002; and that G he would not be pressing for a reversal of the judge's decision that the Bank was not in control of the archive.

The Treasury's appeal

12 The material described in the schedule to the application of 12 March 2002—so far as it now exists—is now held at the Public Records Office in Kew. The Treasury are content to accept, for the purposes of the H application, that—whatever the true legal analysis of the circumstances in which that material was transferred to the Public Records Office in or about 1993 (following the completion of the inquiry)—the documents of which disclosure is sought are in its control within the meaning of rule 31.8. As the judge put it at paragraph 14: "It is evident that whether de facto or de jure

HM Treasury have the power to decide who may or may not inspect the archive and who may or may not have physical possession of it." The Treasury opposes the order sought, first, on the ground that the threshold condition imposed by paragraph (a) of rule 31.17(3) is not met—that is to say, that it has not been established by evidence that the documents of which disclosure is sought "are likely to support the case of the applicant or adversely affect the case of [the Bank]"—and, second, on the ground that, in any event, disclosure has not been shown to be "necessary in order to dispose fairly of the claim or to save costs": see sub-paragraph (b) of that paragraph. As we have already indicated, we are not concerned with the second of those grounds on this appeal.

13 The first part of the schedule to the application notice of 12 March 2002 comprised a list of 138 documents or classes of documents cross-referenced to numbered paragraphs in, it seems, appendix 2 to the Bingham report. Appendix 2 to the report contained a description of the role of the Treasury in relation to the supervision of BCCI and had been disclosed by the Bank to the claimants in December 2001. The second part of the schedule was headed "The Bingham Inquiry Archive". It sought, in relation to each of the individuals and entities listed in annex 1 to the Bingham report, (a) any witness or other statements, (b) any written proof of evidence, (c) any transcript of oral evidence and (d) any other document or documents recording the evidence, observations or written material provided, in each case, to the inquiry by or on behalf of that individual or entity; and any other material obtained and produced by or on behalf of Bingham LJ during the course of the inquiry. Annex 1 to the Bingham report—a copy of which was attached to the application—contains a list of those "who gave evidence to, or made observations relevant to the terms of reference of, the inquiry; or otherwise provided written material to the inquiry". The list includes 79 individuals who gave evidence, made observations or provided written material on their own account, a further 74 individuals who did so on behalf of 11 institutions or entities (including 12 officials from the Bank, eight members of the Board of Banking Supervision and 32 former ministers and officials from the Treasury) and a further 46 institutions or entities who made observations or provided written material, but who did not do so through named individuals. It can be seen, therefore, that the application, as made, was wide ranging.

14 The extent of the disclosure sought on the application of 12 March 2002 was reduced, substantially, in the course of the hearing before the judge. The claimants were content to identify those named in annex 1 to the Bingham report who were said to be "of prime importance at present"; and, without formally abandoning the application for disclosure of material provided by others named in that list, pursued the application on that basis. This exercise in "pruning" had the effect of reducing the number of individuals providing material on their own account to 17 and the total number of entities or institutions to 37. It seems, also, that the applicants did not press for disclosure of the documents identified in the first part of the schedule to the application notice of 12 March 2002—save to the extent that those documents would be found in material provided by those named in the "pruned" annex 1.

15 The scheduled material—identified in the schedules to the order of 31 May 2002—is derived from the pruned version of "The Bingham Inquiry

A Archive" which had formed the second part of the schedule to the application of 12 March 2002. Schedule 1 to the order comprises the names of those identified as "of prime importance at present" in the course of the hearing before the judge, with the omission (i) of the Bank and its officials and (ii) of one individual, Mr S A Hussein. Schedule 2 to the order of 31 May 2002 is in these terms:

B

> "In respect of each person or entity ('the witness') identified at Schedule 1: (1) documents provided by the witness to the inquiry; (2) submissions and observations of the witness; (3) witness statements and proofs of evidence of the witness; (4) transcripts of the witness's evidence; (5) witness bundle used when Bingham LJ interviewed the witness; and (6) post-interview correspondence in respect of the witness.
>
> C Provided that nothing herein shall require production of 'Maxwellisation' drafts or responses to 'Maxwellisation' drafts and that the claimants are at liberty to proceed with their applications against the non-parties in relation thereto."

It is relevant to note that, of those listed in schedule 1 to the order, oral evidence was given only by members of the Board of Banking Supervision
D (six), commissioners or officials of HM Customs and Excise (four), ministers or officials of HM Treasury (12) and partners or employees of Price Waterhouse (six). It is only in relation to those 28 witnesses that there can be expected to be transcripts of evidence. A further 12 individuals were seen informally. It is, perhaps, possible that in relation to those 12 individuals—in addition to the individuals who gave oral evidence—there may be something in the nature of a "witness bundle" and
E there may be "post interview correspondence"; but it is, we think, clear that, in relation to the other individuals and entities named in schedule 1 to the order, the scheduled material is likely to be confined to documents within category 1 (documents provided by the witness to the inquiry) or category 2 (submissions and observations of the witness) in schedule 2 to the order.

F **16** The grounds upon which Mr Hollander, on behalf of the Treasury, submitted that the judge had been wrong to reach the conclusion that the threshold condition in paragraph (a) of rule 31.17(3) was satisfied—as developed in argument in this court—may, we think, fairly be considered under two main heads. First, that the judge failed to direct himself correctly in relation to the requirement that the only documents which a person who is
G not party to the proceedings can be ordered to disclose are documents "likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings", in that (i) he failed to give to the word "likely" the meaning "more probable than not" which (it is said) that word should bear in that context and (ii) he failed to appreciate that the test "likely to support . . . or adversely affect" had to be applied to each individual document or (if the documents were to be described as a class) to each
H document in the class. Second, that the judge failed to recognise that the effect of rule 31.17(2) is to require the applicant to adduce evidence of the matters on which he relies to establish that the threshold condition in rule 31.17(3)(a) is met. In the present case, it is said, the claimants made no attempt to adduce evidence of the matters on which they relied.

The need for evidence

17 It is, we think, convenient to address the second of those criticisms before turning to examine what rule 31.17(3)(a) requires. It is plain that an application for an order for disclosure under rule 31.17 must be supported by evidence—paragraph (2) so provides. And it is plain that there was, at the least, formal compliance with that requirement—see paragraph 3(a) of the witness statement (his fourth) made by Mr Christopher Grierson, a partner in Lovells (the claimants' solicitors), on 8 March 2002. It is plain, also, from paragraphs 6, 13 and 14, and 48 of that witness statement, that the claimants were relying on the Bingham report and its appendices. The judge appreciated that. He said at paragraph 64 of his judgment:

> "The claimants accept that they could go away and devise long and detailed targeted requests for documents and passages in transcripts of evidence based upon references thereto in the report or based on references to meetings likely to have generated memoranda or references to the evidence of those who are identified as having given it to the inquiry. They submit however that that exercise would be extremely time-consuming and costly and it is, they submit, unnecessary."

The judge accepted that submission when he said, in the passage which we have set out earlier in this judgment that, in the very unusual circumstances of this case, the claimants were not required to demonstrate precisely how each and every document or class of documents of which they sought disclosure would support their case or damage that of the Bank.

18 In our view, the judge was entitled to approach the matter on that basis. The judge had been concerned with this litigation for some time. He should be taken to have a comprehensive and detailed knowledge of the issues. We were told that the judge had read the Bingham report; and that he had read, or had the opportunity to read, the relevant appendices. It is, we think, fanciful to suggest that the Bingham report was not "in evidence", notwithstanding that it may not have been exhibited formally to a witness statement on this application. And although the report is not evidence of the matters in issue in these proceedings, it is, plainly, evidence of what material was before Bingham LJ and the conclusions which he drew from that material. The judge was entitled to accept the report and the appendices which he had read as evidence of what the scheduled material, identified in his order of 31 May 2002, was likely to contain. If he were correct in his view as to the test which the threshold condition in rule 31.17(3)(a) required, then he was entitled to take the view that the evidence before him enabled him to decide whether or not that test was satisfied.

19 We would accept that if (as Mr Hollander contends) the threshold condition required a more stringent test—that is to say, a test of "more probable than not" applied to each and every document—there is force in the criticism that the judge did not have the evidence that he needed in order to decide whether that more stringent test were satisfied. But that is immaterial. If the judge applied the wrong test, it is irrelevant that he did not have the material on which to apply the correct test. If the test which he did apply was the correct test, it is irrelevant that he did not have the material on which to apply a more stringent (and, on this hypothesis, an incorrect) test.

The test which the threshold condition requires

20 We turn, therefore, to consider the criticism that the judge failed to apply the correct test when reaching the conclusion that the claimants had satisfied the threshold condition in paragraph (a) of rule 31.17(3) in relation to the scheduled material. As we have indicated, there are two limbs to that criticism. The first is that the judge failed to give to the word "likely" the meaning "more probable than not".

21 The meaning of the word "likely" in a statutory or regulatory context has been considered by the courts on a number of occasions; in particular, in the context of the requirement, in section 8(1)(b) of the Insolvency Act 1986, that an administration order may only be made if the court considers that the making of an order "would be likely to achieve" one or more of the statutory purposes set out in section 8(3) of that Act. In *In re Consumer and Industrial Press Ltd* [1988] BCLC 177, 178, Peter Gibson J held that the evidence must go beyond establishing a mere possibility that a statutory purpose would be achieved: it must enable the court to hold "that the purpose in question will more probably than not be achieved". In *In re Harris Simons Construction Ltd* [1989] 1 WLR 368, Hoffmann J took a different view. He pointed out, at p 370D–E, that on a scale of probability of 0 (impossibility) to 1 (absolute certainty) the test of "more probable than not" required a factor greater than 0·5—which he thought too high. Two of the reasons which he gave are of general application:

> "First, 'likely' connotes probability but the particular degree of probability intended must be gathered from qualifying words (very likely, quite likely, more likely than not) or context. It cannot be a misuse of language to say that something is likely without intending to suggest that the probability of its happening exceeds 0·5, as in 'I think that the favourite, Golden Spurs at 5–1, is likely to win the Derby' . . . Fourthly, as Peter Gibson J said, section 8(1) only sets out the conditions to be satisfied before the court has jurisdiction. It still retains a discretion as to whether or not to make the order. It is therefore not unlikely that the legislature intended to set a modest threshold of probability to found jurisdiction and to rely on the court's discretion not to make orders in cases in which, weighing all the circumstances, it seemed inappropriate to do so."

He preferred, in the context of section 8(1)(b) of the Insolvency Act 1986, a test of "real prospect". His view was followed by Vinelott J in *In re Primlaks (UK) Ltd* (1989) 5 BCC 710, and was adopted, in preference to his own earlier view, by Peter Gibson J in *In re SCL Building Services Ltd* (1989) 5 BCC 746.

22 Decisions on the meaning of the word "likely" in the context of section 8(1)(b) of the Insolvency Act 1986 are not, of course, determinative of the meaning to be given to that word in the context of CPR r 31.17(3)(a). In particular it is pertinent to have in mind that a "real prospect" test is adopted, expressly, in rule 24.2 (grounds for summary judgment) and in rule 52.3 (permission to appeal); and it may be supposed, at least prima facie, that if the rule-making body had intended the test under rule 31.17(3)(a) to be a "real prospect" test it would have said so. But the decisions on section 8(1)(b) of the Insolvency Act 1986 to which we have referred illustrate the point—which may perhaps need no authority—that "likely" does not carry any necessary connotation of "more probable than

not". It is a word which takes its meaning from context. And where the context is a jurisdictional threshold to the exercise of a discretionary power, there may be good reason to suppose that the legislature—or the rule-making body, as the case may be—intended a modest threshold of probability.

23 The context in which the meaning of "likely" in rule 31.17(3)(a) has to be determined includes (i) the statutory power to which rule 31.17 was intended to give effect, (ii) the corresponding provisions in rule 31.16 (disclosure before proceedings start) and the statutory power to which that rule was intended to give effect, and (iii) the circumstances in which the new rules as to disclosure, contained in Part 31, were introduced. It is necessary, therefore, to examine those provisions.

24 Section 33(2) of the Supreme Court Act 1981 empowers the court to order pre-action disclosure; section 34(2) empowers the court to order disclosure against a non-party. The two sections—as amended by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940)—are in these terms, so far as material:

> "33 . . . (2) On the application, in accordance with rules of court, of a person who appears to the High Court to be *likely* to be party to subsequent proceedings in that court, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be *likely* to be a party to the proceedings and to be *likely* to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or *likely* to arise out of that claim—(a) to disclose whether those documents are in his possession, custody or power; and (b) to produce such of those documents as are in his possession, custody or power to the applicant . . ."
>
> "34(2) On the application, in accordance with rules of court, of a party to any proceedings, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be *likely* to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim—(a) to disclose whether those documents are in his possession, custody or power; and (b) to produce such of those documents as are in his possession, custody or power to the applicant . . ." (Emphasis added.)

It can be seen that the structure of the two sections is very similar. They are derived, respectively, from sections 31 and 32 of the Administration of Justice Act 1970. They must be regarded as complementary provisions extending the powers of the court in relation to disclosure.

25 Each of sections 33(2) and 34(2) of the 1981 Act provides that the power which it confers shall be exercisable "in such circumstances as may be specified in the rules". The relevant rules are now, respectively, CPR rr 31.16 and 31.17. We have already set out the provisions of rule 31.17, so far as material. The corresponding provisions in rule 31.16 are these:

> "(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.
>
> "(2) The application must be supported by evidence.

A "(3) The court may make an order under this rule only where—(a) the respondent is *likely* to be a party to subsequent proceedings; (b) the applicant is also *likely* to be a party to those proceedings; (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and (d) disclosure before proceedings have started is desirable in order to—(i) dispose fairly B of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs.

"(4) An order under this rule must—(a) specify the documents or the classes of documents which the respondent must disclose . . ." (Emphasis added.)

C **26** Again, it can be seen that the structure of rules 31.16 and 31.17 is very similar; indeed, paragraphs (2), (4) and (5) are identical and paragraph (1) differs only in identifying the different circumstances in which each rule is to apply. In each case paragraph (3) imposes threshold conditions. The threshold conditions in rule 31.16(3)(a) and (b) require that the applicant and the person against whom the order for disclosure is sought are likely to be parties to subsequent proceedings. There is, of course, no D corresponding provision in rule 31.17(3)—for the obvious reason that rule 31.17 applies to a case where there are existing proceedings to which the person against whom disclosure is sought is not, and is not likely to be, a party. The threshold conditions in rule 31.16(3)(d)(i) and (iii) are reproduced in rule 31.17(3)(b).

27 Rule 31.16(3)(c) requires that, if proceedings had started, the E respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure. Standard disclosure requires a party to disclose only (a) the documents on which he relies, (b) the documents which (i) adversely affect his own case, (ii) adversely affect another party's case or (iii) support another party's case, and (c) the documents which he is required to disclose by a relevant practice direction. It is to be noted that the rule-making body has F not adopted the wider test of "relevance" which is found in section 33(2) of the 1981 Act. There can be no doubt that that reflects a deliberate intention to curtail the process of discovery; to get away from the traditional approach based on "telling the story" or "leading to a train of inquiry" as exemplified by the decision in *Cie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55—see Lord Woolf's report "Access to Justice: G Final Report to the Lord Chancellor on the Civil Justice System in England and Wales" (July 1996), Section III, chapter 12, paras 37–40 and *Civil Procedure*, Spring 2002, vol 1, pp 650–651, para 31.6.3. The statutory power to order disclosure (in accordance with rules of court) where a prospective party is likely to have had in his possession custody or power any documents which are relevant to an issue has been curtailed by the new rules so as to be exercisable only in respect of documents which fall within the first H two categories identified by Lord Woolf in paragraph 38 of "Access to Justice".

28 Rule 31.17(3)(a) reflects a similar approach. The rule-making body has eschewed the wider test of relevance which is found in section 34(2) of the 1981 Act. It has confined the documents of which disclosure may be

ordered to those within categories (a) and (b) of rule 31.6, but with modifications which take account of the twin premises (i) that the applicant does not have, and may never have seen, the documents of which he seeks disclosure and (ii) that the person against whom an order for disclosure is sought is a stranger to the dispute. So, "documents on which he relies" in rule 31.6(a) and "documents which adversely affect another party's case" in rule 31.6(b)(ii) have become "documents likely to support the case of the applicant" and "documents likely to adversely affect the case of one of the other parties to the proceedings" in rule 31.17(3)(a). The statutory power to order disclosure where a person who is not a party is likely to have had in his possession custody or power any documents which are relevant to an issue has been curtailed by rule 31.17(3)(a) in much the same way as the corresponding statutory power to order pre-action disclosure has been curtailed by rule 31.16(3)(c). But there is a difference in language in two respects. First, rule 31.17(3)(a) does not provide, in terms, for disclosure of "documents which adversely affect his own case" or of "documents which support another party's case"; that is to say, there is no mention in rule 31.17(3)(a) of the categories identified in rule 31.6(b)(i) and (iii). An obvious explanation for that apparent omission is that the rule-making body thought it unnecessary to provide for the possibility that a party would pursue an application, supported with evidence, for disclosure of documents which would adversely affect his own case or which would support the case of his opponent. The difference in language does not reflect any difference in substance.

29 Second, the threshold condition in rule 31.17(3)(a) is lowered by the qualification "likely to". It is not necessary that the documents of which disclosure is ordered will support the applicant's own case or that they will adversely affect the case of another party; it is enough that they are likely to do so. The explanation for that difference is also obvious; the rule-making body appreciated that an applicant cannot be expected to specify which documents under the control of another—which he may never have seen—will support his case or adversely affect that of another party, or to know whether he will wish to rely upon them. It further appreciated that the person against whom disclosure is sought—being a stranger to the dispute—cannot be expected to decide for himself which of the documents under his control do support the applicant's case or adversely affect the case of one of the other parties to an action in which he is not a party. Nor can the court be expected to decide whether documents which it has not seen will support the applicant's case or adversely affect that of another party. The test has to be one of probability. The question, of course, is what degree of probability does the test require.

30 The judge found assistance in the judgment of Rix LJ in *Black v Sumitomo Corpn* [2002] 1 WLR 1562. The question in that case was whether pre-action disclosure should be ordered pursuant to section 33(2) of the Supreme Court Act 1981 and CPR r 31.16. Rix LJ, with whose judgment Ward and May LJJ agreed, identified two questions: (i) whether section 33(2) of the 1981 Act required that it be likely that proceedings are issued, or only that the persons concerned are likely to be parties if subsequent proceedings are issued; and (ii) whether "likely" means "more probable than not" or "may well". He held, at p 1584, para 71, in answer to the first of those questions, that the requirement was no more than that the

persons concerned were likely to be parties in proceedings if those proceedings were issued. He went on to say, at pp 1584–1585, para 72:

> "As to the second question, it is not uncommon for 'likely' to mean something less than probable in its strict sense. It seems to me that if I am wrong about the first question, then it is plain that 'likely' must be given its more extended and open meaning (see Lord Denning MR in *Dunning v United Liverpool Hospitals' Board of Governors* [1973] 1 WLR 586), because otherwise one of the fundamental purposes of the statute will have been undermined. If, however, I am right about the first question, the second question is of less moment. Even so, however, I am inclined to answer it by saying that 'likely' here means no more than 'may well'. Where the future has to be predicted, but on an application which is not merely pre-trial but pre-action, a high test requiring proof on the balance of probability will be both undesirable and unnecessary: undesirable, because it does not respond to the nature and timing of the application; and unnecessary, because the court has all the power it needs in the overall exercise of its discretion to balance the possible uncertainties of the situation against the specificity or otherwise of the disclosure requested. Clearly, the narrower the disclosure requested and the more determinative it may be of the dispute in issue between the parties to the application, the easier it is for the court to find the request well founded, and vice versa."

He observed, at p 1585, para 73, that, apart from the two questions of principle which he had identified, the word "likely" itself presented no difficulties: "Temptations to gloss the statutory language should be resisted. The jurisdictional threshold is not, I think, intended to be a high one."

31 Mr Hollander submitted that the judge was wrong to place reliance on those observations. It is said that there is no real parallel between the provisions relating to pre-action discovery which were under consideration in *Black v Sumitomo Corpn* [2002] 1 WLR 1562 and the provisions relating to discovery against third parties which fall for consideration in the present case. We reject that submission. It seems to us that there is a close parallel between rules 16 and 17 in rule Part 31; as there is between the statutory provisions to which those rules are respectively intended to give effect. In particular, it is plain that the word "likely" has a common root in the provisions of sections 31 and 32 of the Administration of Justice Act 1970; that that word is used in the same sense wherever it appears in sections 33(2) and 34(2) of the Supreme Court Act 1981; and that that word is used in the same sense in CPR r 31.16(3)(a) and (b). It would be remarkable if the rule-making body had intended the same word to be understood in a different sense in rule 31.17(3)(a).

32 In those circumstances, unless there were reasons which compelled a different conclusion, we would think it right to reject the submission that the word "likely", in the context of the threshold condition in rule 31.17(3)(a), means "more probable that not"; and to hold that the word has, in that context, the meaning "may well" which this court thought it should bear in rule 31.16(3)(a) and (b). We are not persuaded that there are reasons which compel a different conclusion. Indeed, it seems to us that the reasons which led this court to reach the conclusion which it did in *Black v Sumitomo Corpn* have equal force in the context of rule 31.17(3)(a). As Rix LJ pointed

out, a high test requiring proof on the balance of probability would be both undesirable and unnecessary, for the reasons which he gave.

33 In rejecting the submission that the test which the threshold condition in rule 31.17(3)(a) requires is "more probable than not", we should not be taken to accept that the hurdle posed by that condition is, necessarily, as low as that which has to be surmounted when applying the "real prospect" test under other provisions in the Civil Procedure Rules. In the context of rule 24.2, or rule 52.3, "real prospect" has been held to mean "realistic, as opposed to fanciful": see *Swain v Hillman* [2001] 1 All ER 91, 92J and *Tanfern Ltd v Cameron MacDonald (Practice Note)* [2000] 1 WLR 1311, 1316, para 21. We have already pointed out that if the rule-making body had intended the test under rule 31.17(3)(a) to be a "real prospect" test, it may be supposed that it would have said so. We think that the word "likely", when used in the Civil Procedure Rules, connotes a rather higher threshold of probability than merely "more than fanciful". But a prospect may be more than fanciful without reaching the threshold of "more probable than not". We share the view expressed by Rix LJ in *Black v Sumitomo Corpn* that, properly understood, the word "likely" presents no difficulties; and that the temptation to gloss the statutory (or regulatory) language should be resisted. We should add, also, that it follows from our conclusion that in the context of rule 31.17(3)(a) "likely" does not mean "more probable than not", that it is no bar to an order for disclosure that the court is of the view that the document to be disclosed is as likely—or more likely—to support the case of one of the other parties to the proceedings, as it is to support the case of the applicant. It is enough that the court is satisfied that the document is likely to support the case of the applicant. The fact that the court (without sight of the document) may think that, if it turns out not to support the case of the applicant then it is likely that the document will support the case of one of the other parties, is irrelevant.

Documents or classes of document

34 The second limb of the submission that the judge failed to direct himself correctly in relation to the threshold condition in rule 31.17(3)(a) is found in the criticism that he failed to appreciate that the test "likely to support . . . or adversely affect" had to be applied to each individual document or, if the documents were to be described as a class, to each document in the class. It would be surprising if that criticism could be made good in the circumstances that the judge considered, at some length, the decision of this court in *American Home Products Corpn v Novartis Pharmaceuticals UK Ltd* [2001] FSR 784, in which the point was addressed, and directed himself in the light of that decision.

35 The application in the *Novartis* case was for an order under rule 31.17 that Fisons Ltd (who were not party to the proceedings) make disclosure of documents relating to the validity of the patent in suit ("the use of rapamycin for the preparation of a medicament for inhibiting organ or tissue transplant rejection in a mammal in need thereof") which were identified by Dr Gordon Wright, a patent attorney, on a visit to Fisons Ltd's offices "and separated by him into a box". The documents comprised records of the patent department of the pharmaceutical division of Fisons in respect of collaboration between Fisons and a Japanese company, Fujisawa, in relation to an immunosuppressant, FK-506. It was said that knowledge

A that FK-506 was a potent inhibitor of transplant rejection was an important factor in support of the defendant's challenge to the patent in suit on the grounds that the invention was obvious. Dr Wright's evidence, at p 789, was:

> "(1) I asked to see all the patent department collaboration files. (2) I have no reason to believe that I was not provided with all of them. B (3) All of them, and not just those which I considered to be of relevance, were put into a box and separated from the other non-collaboration documents held at Holmes Chapel"—Fisons' offices—"(4) I do not believe that it is likely that other documents relating to the collaboration will be held by Fisons Ltd other than the patent department collaboration files."

C The application was refused by Laddie J on the ground (amongst others) that it appeared from that evidence—and, in particular, from paragraph (3)—that it was clear that some of the documents in the box of which disclosure was sought were not relevant. He held, following the observations of Pumfrey J in *In re Howglen Ltd* [2001] 1 All ER 376, 382–383, that: "If the order covers disclosure which, on any basis, includes material which is D accepted to be irrelevant, then I do not think the court has power to make the order."

36 Aldous LJ, with whose judgment Robert Walker LJ and Sir Anthony Evans agreed, accepted that the court had no power to make an order under rule 31.17 in respect of a class of documents if it were established that there were documents within the class that were not relevant to any issue in the proceedings—in the sense that they did not satisfy the threshold condition of E "documents . . . likely to support the case for the applicant or adversely affect the case of one of the other parties". That, if we may say so, must be right. The rule gives no power to order a non-party to disclose documents which do not meet the threshold condition in sub-paragraph (a) of paragraph (3); and that cannot be circumvented by including documents which do not meet that threshold condition in a class which also includes F documents which do meet that condition. In particular, the threshold condition cannot be circumvented by an order which puts upon the non-party the task of identifying those documents within a composite class which do, and those which do not, meet the condition: see *Wakefield v Outhwaite* [1990] 2 Lloyd's Rep 157, 163–164 and *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] Ch 142, 151F.

37 Aldous LJ then turned to consider whether the documents sought by G the applicant were relevant "in the sense that they meet the criteria laid down by rule 31.17": see [2001] FSR 784, 794, para 32. He concluded, at p 794, para 33, that the evidence established that "the box contains relevant documents which the court has power to require to be disclosed". He then addressed, and rejected, the submission that the box also contained documents that were not relevant. That submission was based, of course, on H paragraph (3) of the passage in Dr Wright's evidence (set out in paragraph 35 above). Aldous LJ said, at p 794, para 34:

> "Dr Wright's view of 'relevance' cannot be determinative particularly when clearly he was considering the stature of individual documents, rather than the class. To decide what weight to place on any particular

document, it will be necessary to consider it in a context. If so, a selection limited to documents Dr Wright thought were individually relevant or even those Fisons thought were relevant could provide a false picture . . . No doubt particular documents may turn out to be more relevant than others; some individual documents may not be 'relevant' at all."

It is, we think, plain that Aldous LJ placed the word "relevant" between quotation marks in paragraph 34 to emphasise that he was using the word in a different sense from that in which he had used the same word (without the quotation marks) in paragraphs 32 and 33. In paragraphs 32 and 33 relevant is synonymous with "likely to support . . . or adversely affect". In paragraph 34 "relevant" documents are those which will, in the event, turn out to support the case for the applicant or adversely affect the case of one of the other parties. Unless the word "relevant" is understood in that sense in the context of paragraph 34 it is impossible to reconcile his readiness to contemplate the possibility that an order under rule 31.17 might lead to disclosure of "individual documents [which] may not be 'relevant' at all" with his acceptance, in paragraph 32 of the proposition that an order for disclosure is not to be made unless "the documents . . . to be disclosed . . . are relevant in the sense that they meet the criteria laid down by rule 31.17". The distinction is between documents which are *likely* to support the case of the applicant or adversely affect the case of one of the other parties—which can be the subject of an order for disclosure—and documents which, in the event, turn out not to support the case for the applicant or adversely affect the case of one of the other parties—the presence of which within a class does not lead to the conclusion that the class ought not to have been the subject of an order for disclosure.

38 The judgments of this court in the *Novartis* case may be taken as authority for the following propositions. First, as we have said, (i) rule 31.17 gives no power to order a non-party to disclose documents which do not meet the threshold condition in sub-paragraph (a) of paragraph (3); and (ii) that cannot be circumvented by including documents which do not meet that threshold condition in a class which also includes documents which do meet that condition. Second, the test under the threshold condition is whether the document is likely to support the case for the applicant or adversely affect the case of one of the other parties. Third, when applying that test it has to be accepted, and is not material, that some documents which may then appear likely to support the case of the applicant or adversely affect the case of one of the other parties will turn out, in the event, not do so. Fourth, in applying the test to individual documents, it is necessary to have in mind that each document has to be read in context; so that a document which, considered in isolation, might appear not to satisfy the test, may do so if viewed as one of a class. Fifth, there is no objection to an order for disclosure of a class of documents provided that the court is satisfied that all the documents in the class do meet the threshold condition. In particular, if the court is satisfied that all the documents in the class, viewed individually and as members of the class, do meet that condition—in the sense that there are no documents within the class which cannot be said to be "likely to support . . . or adversely affect"—then it is immaterial that some of the documents in the class will turn out, in the event, not to support

A the case of the applicant or adversely affect the case of one of the other parties.

39 With those propositions in mind, we turn to consider the way in which the matter was addressed by the judge. After setting out paragraphs 33 and 34 in the judgment of Aldous LJ in the *Novartis* case [2001] FSR 784, 794, he said, at paragraph 78:

B "From that passage two, possibly three, points emerge. Firstly, in paragraph 33 Aldous LJ was plainly not requiring it to be shown that the material of which disclosure was sought would support the applicant's case. It was enough that it was shown that it could. Secondly, in paragraph 34 Aldous LJ held, as I read his judgment, that a document may be relevant for the purposes of rule 31.17 because it places another document or documents in context, even though it may not itself contain C anything which goes directly to the issues in the case. The third point I offer with more diffidence. However it seems to me that Aldous LJ recognised that it would be a perfectly proper exercise of the jurisdiction to order disclosure of a class of documents some documents within which class might ultimately prove not to be documents which supported the applicant's case or damaged that of his adversary—that D I apprehend is what he intended to convey by putting the word relevant at the end of paragraph 34 in quotation marks so as to emphasise that some documents might not, although ordered to be disclosed, satisfy the test of relevance as it is spelled out in rule 31.17. The Court of Appeal must in my view be taken to have impliedly overruled the decision of Pumfrey J, relied on by Laddie J, to the effect that the court must be satisfied that all of the documents falling within the class are documents which satisfy the E requirements of rule 31.17(3)(a)."

It will be apparent, from the propositions which we have already set out, that we endorse each of the three points identified by the judge. We comment, only, that the judge's reference to "the test of relevance as it is spelled out in rule 31.17", in the penultimate sentence of that passage, is not to be understood as a reference to a test of "likely to support . . . or adversely F affect" but—as the context shows the judge must have intended—to the different test that "relevant" documents are those which will in fact turn out to support the case for the applicant or adversely affect the case of one of the other parties. The judge's reference to "documents which satisfy the requirements of rule 31.17(3)" in the final sentence of that passage must be understood in the same sense. This court, as the judge appreciated, did not G hold in the *Novartis* case that there was power to order disclosure of a class of documents where not all the documents in the class satisfied the test of "likely to support . . . or adversely affect". The real difference between this court and Laddie J in the *Novartis* case, as it seems to us, is that this court did not accept Laddie J's view—based on a concession which he thought had been made—that some of the documents in Dr Wright's box were bound to turn out not to be "relevant" in the sense to which we have just referred. H This court was satisfied that, subject to an adjustment of the cut-off date, any and all of the documents in the box were likely to be "relevant".

40 It follows that we reject the criticism that the judge failed to appreciate that the test "likely to support . . . or adversely affect" had to be applied to each individual document or, if the documents were to be

described as a class, to each document in the class. We are satisfied that he recognised the need to apply the test to each document in the classes with which he was concerned. The remaining question is whether he did so.

Application of the test in this case

41 It is important to keep in mind the circumstances in which the scheduled material, identified in the order of 31 May 2002, came into existence. On 1 August 1991, shortly after his appointment as the person to undertake the inquiry, Bingham LJ issued a press statement. That set out the terms of reference which determined the scope of the inquiry: "To inquire into the supervision of BCCI under the Banking Acts; to consider whether the action taken by all the United Kingdom authorities was appropriate and timely; and to make recommendations." The press statement invited submissions and evidence:

> "The inquiry is seeking assistance from the parties most directly involved in the supervision of BCCI but I am concerned to ensure that all reasonable lines of inquiry are pursued and to that end written submissions and evidence are invited from any party or member of the public with an interest in the subject matter of this inquiry."

Parties responding to that invitation were sent a statement of the procedure which the inquiry proposed to adopt. That statement contained the following paragraphs:

> "1. An invitation is being extended to the public at large inviting written submissions and evidence.
>
> "2. Written evidence and documents are being and will be sought from the Bank of England, the Treasury and others who may be able to give evidence relevant to the inquiry's terms of reference.
>
> "3. Selected witnesses will thereafter be invited to give oral evidence."

As indicated in paragraph 2 of the statement of procedure, specific requests for assistance on matters within the terms of reference were made to the Bank, the Treasury and others. We have been shown one of those requests; and it is reasonable to assume that others were in much the same terms.

42 It is reasonable, also, to assume that those named in annex 1 to the Bingham report as witnesses "who gave evidence to, or made observations relevant to the terms of reference of, the inquiry; or otherwise provided written material to the inquiry" did so in response to the request in the press statement or to specific requests; and that the observations made and material provided were (as requested) confined to matters relevant to the terms of reference. Further, it is reasonable to assume that those witnesses who gave oral evidence were selected on the basis that the evidence which they might give was of particular relevance; and that the interviews, conducted by a judge as eminent and experienced as Bingham LJ, were carefully focused.

43 The scheduled material can be seen as a single class; but a more accurate analysis of that material is that it comprises a number of discrete classes, each defined by the source from which the material comes, which themselves comprise a number of discrete sub-classes, each defined by the nature of the material supplied (for example, documents, submissions, witness statements, transcripts of evidence). The question for the judge,

A therefore, was whether, in relation to each of the documents in each sub-class, the test of "likely to support . . . or adversely affect" was satisfied. If it were, then there can be no objection to an order for disclosure of all the documents in that sub-class (identified and described as members of that sub-class). Nor can there be objection to an order for disclosure of a class of documents comprising a number of such sub-classes.

B **44** The judge recognised that. He said, at paragraph 79:

> "Although obviously on a very different scale the present case is in many ways similar to the patent case. The compilation of the archive by Bingham LJ may be said to be broadly analogous to the compilation of the box of documents by Dr Wright. Both were focused exercises. Just as in the patent case, so here, if disclosure is ordered the non-party will not be required to perform any critical judgment as to relevance—disclosure would be ordered on the basis that the identified part of the archive, for example the material supplied by and the evidence of the British Banker's Association, was required to be disclosed in its entirety."

C After explaining in the first of the two paragraphs numbered 81 (in a passage set out earlier, in paragraph 10 of this judgment) that it was unnecessary in the very unusual circumstances of this case to demonstrate in relation to each and every document in each class how precisely it would support the claimants' case or damage that of the Bank or to eliminate the possibility that some of the documents might turn out on inspection to have no probative value, he went on to say, in the second of those paragraphs:

D

> "As I have mentioned, during the course of the hearing Mr Pollock produced a request for disclosure which was limited to material emanating from persons who might reasonably be expected to have been imparting information to the Inquiry concerning supervision or what was known about BCCI in the banking community rather than information concerning the commission of crime."

E He pointed out that there could and should be excluded from the request material emanating from the Bank (on the grounds that that would be disclosed in the course of inter-party disclosure) and continued:

F

> "The list includes two persons without an adequate or any description of their role, Mr N Hodges and Mr S A Hussein. For the time being I exclude them from consideration also. Subject to those observations I regard the claimants as having satisfied in relation to this limited request for disclosure the jurisdictional requirement represented by rule 31.17(3)(a)."

G It is clear that the judge had subjected both the original and the revised requests for disclosure to critical examination on a sub-class by sub-class basis and had satisfied himself that all the documents in each sub-class met the threshold test.

H **45** For the reasons which we have set out, we are satisfied that the judge directed himself correctly as to the test which the threshold condition imposed by rule 31.17(3)(a) required; that the evidence before him enabled that test to be applied; and that, in applying that test, the judge was entitled to reach the conclusion which he did. We dismiss the Treasury's appeal against the declaration in paragraph (3) of the order of 31 May 2002.

The claimants' appeal

46 As we have said, Mr Pollock made it clear that, if the Treasury's appeal were dismissed, his clients would be content to pursue their objectives of disclosure and inspection under the application of 12 March 2002 and would not be pressing for a reversal of the judge's decision that the Bank was not in control of the archive. In those circumstances it would, perhaps, be sufficient to say that we agree with the judge, for the reasons which he gave. Indeed, we are tempted to say no more than that, because we find it difficult to think that any reasons which we might express would be more compelling than his. Nevertheless, in deference to the arguments advanced in this court, we add some short observations of our own.

47 "Control" for the purposes of disclosure and inspection under CPR Pt 31 is defined by rule 31.8(2), which we have set out earlier in this judgment. It is not suggested that the documents which comprise the archive held by the Public Records Office at Kew are now in the physical possession of the Bank. To the extent that some of those documents may once have been in the Bank's possession—that is to say, documents provided by the Bank to the inquiry—the Bank accepts the obligation, subject to questions of public interest immunity and confidentiality, to provide such copies as it has retained. That is not the area of dispute on this appeal. The issue on this appeal is whether, in respect of documents comprised in the archive of which the Bank has never had physical possession, the Bank has a present right to possession or a present right to inspect and take copies.

48 Mr Pollock accepts that the Bank had no right to possession of, or to inspect or take copies of, those documents while they remained in the possession of Bingham LJ—or, to put the matter a little more broadly, while those documents remained in the possession of the "Inquiry", including in that expression Mr R A D Jackson, the secretary to the inquiry, while acting in that capacity. To suggest otherwise would be to ignore the basis upon which the inquiry was established and upon which material was provided and evidence given to Bingham LJ—namely, that the inquiry was to be "independent". It is, we think, obvious that the independence of the inquiry would have been compromised in the eyes of those who were invited to provide material or give evidence if they had thought that sight of the material which they were to provide or the evidence which they were to give (which might well be critical of the Bank) could be demanded by the Bank.

49 Accepting that as the starting point, Mr Pollock submits that the Bank's right to possession or right to inspect and take copies—or, as he put it, "ownership"—of the archive material, arose on the conclusion of the inquiry. The difficulty is to explain how that occurred. "Ownership", in so far as it is a useful concept at all in this context, means no more than the right to alienate or dispose, the right to possess to the exclusion of others or the right from which others derive their rights to possess. But there can be no question, in the present case, of ownership or a right to possess reverting to the Bank on the conclusion of the inquiry, or of the Bank's right "reviving", because the Bank never had such a right before or during the inquiry. For the Bank to acquire a right on the conclusion of the inquiry, it is necessary to postulate either (i) that someone with the right to dispose of the documents (or of some relevant right in respect of the documents) did so in favour of the Bank or (ii) that a previous owner abandoned the documents in circumstances which enabled the Bank to acquire rights analogous to those

of a "finder". There is no factual basis for an analysis under either of those heads.

50 Those with a previous right to dispose of the documents included (i) those who provided the documents to Bingham LJ for the purposes of the inquiry and (ii) Bingham LJ himself, in so far as he generated the documents or received them in circumstances in which it may be held that the previous owner intended that he should thereby have the right to dispose of them. But it is unnecessary to make the distinction because there is no basis for a finding that the previous owners or Bingham LJ (or Mr Jackson on his behalf) ever intended to dispose of the documents in favour of the Bank. The judge has set out, in detail, the memoranda of the meeting on 11 November 1992, attended by representatives of the Treasury, the Bank and the Public Records Office and by Mr Jackson, at which the future arrangements for custody of, and control of access to, the archive were discussed and the correspondence which followed that meeting. The outcome of that meeting was a decision to transfer physical custody of the archive to the Public Records Office and to establish an ad hoc committee which would, at least in the medium term, control access to it. The Bank was to be represented on that committee; but there is nothing to suggest that it was to have more than a consultative role. In particular, there is nothing to suggest that the Bank was, itself, to have any right to possess or to inspect the documents in the archive.

51 The judge accepted that it was difficult to be confident that any analysis of where "ownership" of the archive now lay was correct. We agree. We also agree that it is unnecessary to decide that question. The relevant question in the context of the present appeal is whether the Bank has a present right to possession or to inspect and take copies. The judge held that the answer to that question was not in doubt. It was plain that the Bank did not have either of those rights. In our view he was correct to reach that conclusion; and in the light of that conclusion he was bound to hold that the Bank was under no obligation to disclose the archive.

Conclusion

52 Each of these appeals is dismissed.

Appeals dismissed.

Solicitors: Treasury Solicitor; Freshfields Bruckhaus Deringer; Lovells.

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